KHOR HOI CHOY

v.

MENTERI DALAM NEGERI, MALAYSIA & ORS.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[CRIMINAL APPLICATION NO. 2 OF 1985]
28 SEPTEMBER 1985

CRIMINAL LAW AND PROCEDURE: *Application for order of habeas corpus - Statutory interpretation - Emergency (Public Order and Prevention of Crimes) Ordinance 1969, ss .4(1), 7 - Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 11(1), 6(5), 7, 9(3), 22 - Powers of Advisory Board - Validity of extension order - Article 151(1)(a) of Federal Constitution - Right of representation - Whether application should be allowed.*

The applicant was here asking for an order of *habeas corpus*. The applicant was detained for a period of 2 years from 16 July 1983 to 15 July 1985 under a detention order made in pursuance of s. 4(1) of the Emergency (Public Order and Prevention of Crimes) Ordinance 1969 ("the Ordinance"). The applicant's order of detention was reviewed by the Advisory Board in July 1985 and the Board recommended to the Minister that the applicant's detention be extended for another year. The Minister directed the further extension of the applicant's detention under the Dangerous Drugs (Special Preventive Measures) Act 1985 ("the Act"). The applicant's main contention is that the Advisory Board has no power under s. 11(1) of the Act to review the s. 4(1) Order of the Ordinance.

Held:

[1] The Advisory Board has acted contrary to the intention of s. 11(1) of the Act by reviewing the existing detention order under s. 7 of the Ordinance. There was no detention order made under s. 6 or s. 7 of the Act and the review was not conducted within the time specified in the relevant provision. The mere incorporation by reference of a section in another Ordinance or Act does not extend the provision of the section in the Ordinance to the Act. The review by the Advisory Board under s. 11(1) and its consequential report under s. 11(4) are invalid.

[2] In the circumstances, in the view of the absence of any rules or regulations made by the Yang di-Pertuan Agong under s. 9(3) of the Act, any review convened under s. 11(1) where representations under s. 9 have been made was premature and improper.

[3] The irregularity of the communication of the order related only to the service of the order and this does not render the order invalid.

[4] It is sufficiently clear that under the amended Article 43A of the Federal Constitution, the Deputy Ministers shall for, the discharge of their duties and functions, have all the powers of the Ministers.

[5] When in doubt about the validity of a detention or restriction order it should always be resolved in favour of the accused.

[Application allowed. Order that applicant shall be set at liberty.]

Cases referred to:
Tan Boon Liat @ Allen and Anor. et. el. [1977] 2 MLJ 108
Subramaniam v. Menteri Hal Ehwal Dalam Negeri [1977] 1 MLJ 182
Abdul Karim v. State of West Bengal [1969] AIR 1028
N.N. Majumdar v. N.M. Bardhan [1959] AIR Calcutta 219
The Reverend Thomas Pelham Dale's case [1881] 6 QBD 376
Musa bin Salleh v. PP [1973] 1 MLJ 167
Ex parte Johannes Choeldi & Ors. [1960] MLJ 186

Legislation referred to:
Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 6(1), (3), (5), 7, 9(3), 11(1), 22
Emergency (Public Order and Prevention of Crimes) Ordinance 1969, ss. 4(1), 7, (1)
Federal Constitution, arts. 43A, 43A(2), 151(1), (a), (b)

For the applicant - Gooi Hock Seng (Peter Huang with him); M/s. Shan & Gooi
For the respondents - Zaleha Zahari; SFC

JUDGMENT

Mohamed Dzaiddin J:

This is an application for an order of *habeas corpus* by Khor Hoi Choy @ Khaw Hai Chai, the applicant who is being detained at Pusat Pemulihan Akhlak, Pulau Jerjak under Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316) for a period of one year from 15 July 1985 by an Order of the Minister of Home Affairs dated 15 July 1985 ("the said Order").

The application is supported by the affidavit of Madam Tai Lei Nai, the wife of the Applicant affirmed on 22 July 1985. In paragraph 8, she sets out nine grounds for challenging the validity of the said Order. However, at the hearing of the application, Mr. Gooi, Counsel for the applicant, consolidated the grounds and submitted under five major grounds.

The following facts are not disputed:

1) The applicant was detained for a period of 2 years from 16 July 1983 to 15 July 1985 under the detention order dated 6 July 1983 made in pursuance of s. 4(1) of the Emergency (Public Order and Prevention of Crimes) Ordinance 1969 ("the Ordinance");

2) The applicant was detained at Pusat Pemulihan Akhlak, Muar from 17 July 1983 to 12 March 1984 and Pusat Pemulihan Akhlak Pulau Jerjak, Penang from 12 March 1984 until 15 July 1985;

3) On 11 July 1985, the Advisory Board reviewed the applicant's previous order of detention made under s. 4(1) of the Ordinance. The Board heard representation made by the applicant but was of the opinion that his detention be extended for a further period of 1 year on the same grounds as those on which the applicant's detention order was originally made (s. 4(1) Order). The Board, on the same day, reported to the Minister its finding;

4) On 15 July 1985 the Deputy Minister of Home Affairs received a report from the Advisory Board pursuant to s. 11(4) of the Act regarding the applicant. He was satisfied with the opinion in the report of the Advisory Board and accordingly directed the applicant's detention under the Ordinance be extended for a further period of 1 year from 15th July 1985;

5) The Applicant was removed from Pulau Jerjak to Cawangan Anti Dadah at Georgetown on 15 July 1985 and was detained there until 18 July 1985 when he was served with the said Order by two officers of the Cawangan Anti Dadah Penang. He was then taken back to Pulau Jerjak on the same day.

From submission of Counsel for the applicant it appears to me that the crunch of his contention is that the Advisory Board has no power under s. 11(1) of the Act to review the s. 4(1) Order of the Ordinance. It is not disputed that in the present case the review which was held on 11 July 1985 was in respect of the s. 4(1) Order under the Ordinance. I refer to the Affidavit of the Chairman of the Advisory Board affirmed on 24 August 1985 (encl. 11). He stated that the Advisory Board was empowered to review every order of detention made under s. 4(1) of the Ordinance **and thereafter** (emphasis is mine) under s. 11(4) of the Act for the Board to submit its report to the Minister stating the opinion whether the detention order should be extended pursuant to s. 6(5) of the Act. The affidavit of En. Radzi bin Sheikh Ahmad, the Deputy Minister of Home Affairs (encl. 12) confirmed this. He stated that on 15 July 1985 he received a report from the Advisory Board pursuant to s. 11(4) of the Act in respect of the applicant.

Section 11 of the Act reads as follows:

> 11. (1) Every order or direction made or given by the Minister under the sub-section (1), (3) or (5) of s. 6 or under s. 7 shall, so long as it remains in force and whether or not representations under s. 9 have been made, be reviewed by an Advisory Board not earlier than twelve months from the date of such order or direction and in any case not later than three months before the expiration of the period mentioned in such order or direction:
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> Provided that the Minister may, at any time during the period of detention or restriction imposed by such order or direction, direct the Advisory Board to review the case.
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> (2) The Advisory Board shall, on completing every review under this section, submit to the Minister, before the expiration of the period of detention or restriction, a written report of every such review.
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> (3) (Not relevant.)
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> (4) Where the Advisory Board has reported that in its opinion the detention or restriction should continue or be extended, the Minister may continue or extend the detention or restriction of the person concerned.

Sub-section (1) refers to an order made by the Minister under Sub-sections 1, 3, 5, of s. 6 and under s. 7 of the Act. These sections relate to a detention order, a restriction order, an extension detention order and suspension of detention order. So long as the Order is in force the Advisory Board can review the said Order not earlier than twelve months from the date of the Order and not later than three months before its expiry. Provided of course, the Minister may direct the Advisory Board at any time during detention to review the case.

Reverting to the affidavit of the Chairman of the Advisory Board (encl. 11) it is clear that he acted to review the order under s. 7(1) of the Ordinance and on completion of the review he submitted his report to the Minister under s. 11(4) of the Act. He cannot have acted under s. 11(1) of the Act because under the sub-section, the review must be held not earlier than twelve months and not later than three months before the expiration of the existing order, unless such review was directed by the Minister. There was nothing stated in any of the two affidavits (encl. 11 and 12) that the Minister gave direction to the Advisory Board to review the case. But under s. 7 of the Ordinance, the Chairman has a discretion to review the detention order from time to time so long as the order remains in force. From these, I am forced to conclude that the Advisory Board has acted contrary to the intention of s. 11(1) of the Act by reviewing the existing Detention Order under s. 7 of the Ordinance and proceeded to report to the Minister its finding under s. 11(1) of the Act.

Cik Zaleha, for the respondent, contended that s. 11(1) is an additional review and its provision is to be read not in isolation but must be considered, to use her own words "at the source" i.e. the Advisory Board could derive its power of review from section 7 of the Ordinance. And under s. 7(1) of the Ordinance the Advisory Board may at the discretion of the Chairman, from time to time review every Detention Order so long as it shall remain in force. I think it is on the strength of s. 6(5) which influenced Cik Zaleha to urge the Court to import s. 7 of the Ordinance when construing s. 11(1) of the Act. In my opinion, I do not think the Court can do so. The mere incorporation by reference of a section in the another Ordinance or Act does not extend the provision of the section in another Ordinance to the Act. The Act must be explicit on this. The Act requires strict interpretation and it is always the duty of the Court to interpret the law according to the established principles of construction. This Act which came into force on 30 May 1985 is intended to provide for the preventive detention of persons associated with any activity involving in trafficking of dangerous drugs. It was promulgated pursuant to Article 149 of the Constitution and it certainly affects the fundamental liberty of the subject. It is of utmost importance that there should be strict compliance with the requirement of the Act (see: *Tan Boon Liat @ Allen and Anor. et. el.* [1977] 2 MLJ 108.

In my opinion, under s. 11(1) of the Act, the Advisory Board can only act under an order made by the Minister under ss. 6(1), (3) or (5) or under s. 7 of the Act. In short, there is thus a power given by this s. 11(1) to review only every order of the Minister made under s. 6 or s. 7. In the present case, was there an order made either under s. 6 or s. 7 to enable the Advisory Board to conduct its review pursuant to s. 11(1)? The short answer is 'no'. In fact there are two prerequisites or conditions precedent which the Advisory Board has to fulfil before commencing to review under s. 11(1) of the Act. First, there must be an existing order made by the Minister either under s. 6 or s. 7. It is not disputed that on 11 July 1985 when the Advisory Board conducted its enquiry there was no such detention order made pursuant to the above sections. Secondly, the review must be conducted not less than three months before the expiration of the existing order. Both conditions were not satisfied by the Advisory Board. Therefore, for these reasons, the review by the Advisory Board under s. 11(1) and its consequential report under s. 11(4) are invalid.

With regard to s. 6(5) of the Act, it is clear that the Deputy Minister of Home Minister of Home Affairs issued the Order and the allegation of facts (Exh. RSA(1) and RSA(2) in encl. 12) after careful consideration of the report of the Advisory Board. Accordingly, he directed that the duration of the Detention Order made under s. 4(1) of the Ordinance be extended for a further period of one year from 15 July 1985. Insofar as the Order is concerned, I agree that the Deputy Minister has acted in accordance with the sub-section. However, what is fatal was the fact that he acted on the report of the Advisory Board which for reasons I have stated earlier is invalid and *ultra vires* s. 11(1) of the Act.

The second ground concerns the interpretation of s. 9(3) of the Act. It was contended by the applicant that the Advisory Board has prematurely and improperly convened a review under s. 11(1) of the Act when no rules under s. 9(3) have been made by the Yang di-Pertuan Agong. Here, Cik Zaleha conceded that the Yang di-Pertuan Agong has not made any rules as to the manner in which representation may be made and for regulating the procedure of the Advisory Board. However, she contended that until the Yang di-Pertuan Agong makes the rules, s. 22(3) of the Act applies. Section 22(1) says the Minister may make regulations to carry out the purposes of this Act. Sub-section 2 provides the type of regulations which the Minister can make. Then, Sub-section 3 states as follows:

> All rules and regulations made, and directions given, under the Emergency (Public Order and Prevention of Crime) Ordinance 1969, shall be deemed to have been made or given under this Act shall accordingly have effect, amended if necessary under this section, for the purposes of this Act until such time as the rules, regulations or directions are revoked.

There is clearly something to be said about the specific powers of the Yang di-Pertuan Agong under s. 9(3) and the general powers of the Minister to make regulations under s. 22 of the Act. From my reading of s. 9, it is clear that the said section enacts the mandatory provisions of Article 151(1) of the Constitution. It is for this reason that Sub-section 3 stipulates that the Agong and not the Minister who may make rules relating to the representation and for regulating the procedure of the Advisory Board with regard to such representation. I should of course add here that Sub-section (3) speaks of rules for regulating the procedure of the Advisory Board which I construe to mean a specific procedure pertaining to the representation to the Advisory Board under s. 9 of the Act. It follows that under Article 151(1)(b) and enacted in s. 10 of the Act that the representation and the recommendation of the Advisory Board shall be considered by the Agong. Under the Act, any representation to the Advisory Board must follow the procedure to be set out under Sub-section (3). It is wrong for the Advisory Board to follow or adopt the Public Order and Prevention of Crime (Procedure) Rules 1972 which was made under the Ordinance. In the circumstances, in view of the absence of any rules or regulations made by the Yang di-Pertuan Agong under s. 9(3) of the Act, any review convened under s. 11(1) where representations under s. 9 have been made was premature and improper.

The third ground again relates to the right of representation as guaranteed under Article 151(1)(a) of the Constitution. It was submitted by Counsel that the Extension Detention Order issued by the Deputy Minister under s. 6(5)(a) was made without the applicant having had an opportunity of making a representation.

The affidavit of the Chairman (encl. 11) stated that before the review took place on 11 July the applicant was served with a notice of hearing and was informed that the Advisory Board would be prepared to hear any representation and that he would be allowed to appear in person or represented by Counsel. During the hearing the Advisory Board heard his representation which lasted not less than 30 minutes and he was given a reasonable opportunity to make his representation. Here, it is quite obvious the Advisory Board followed the procedure laid down in Public Order and Prevention of Crime (Procedure) Rules 1972. The quarrel of the applicant is that an order of the Minister made in pursuance of s. 6(5)(a) does not give the applicant the same right of representation had an order been made under s. 6(5)(b) or (c). This, according to Counsel is contrary to the spirit of Article 151(1)(a) of the Constitution. Section 6(5) reads as follows:

> The Minister may, where the Advisory Board has reported under subsection (4) of s. 11 that in its opinion the detention or restriction should be extended, direct that the duration of any detention order or restriction order made under this Part or any detention order or restriction order made under s. 4 or 4A respectively of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 in respect of a person associated with any activity relating to or involving the trafficking of dangerous drugs under the Dangerous Drugs Act 1952 be extended for such further period, not exceeding two years, as he may specify, and thereafter for such further periods, not exceeding two years at a time, as he may specify, either -
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> (a) on the same grounds as those on which the order was originally made;
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> (b) on grounds different from those on which the order was originally made; or
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> (c) partly on the same grounds and partly on different grounds:

Provided that if a detention order is extended on different grounds or partly on different grounds, the person to whom it relates shall have the same rights under s. 9 as if the order extended as aforesaid were a fresh order.

Clearly, the sub-section makes a distinction between the extension order made on the same grounds on which the order was originally made and on different grounds or partly on same grounds and partly on different grounds. Hence, where the Order is made under s. 6(5)(b) or (c), the detainee shall have the right to make representations to the Advisory Board under s. 9. This is done in order to comply with Article 151(1)(a) of the Constitution because the Extension Order was based on grounds which were different from those on which he was originally detained or partly same grounds and partly different grounds. Under the circumstances, he must be given the right to make representations under s. 9. On the other hand, I do not think it was necessary for a second representations when the Extension Order was made on the same grounds as those on which he was originally detained. Any omission in the Act to provide similar representation as those under s. 6(5)(b) or (c) does not violate Article 151(1) of the Constitution. I have also considered *Subramaniam v. Menteri Hal Ehwal Dalam Negeri* [1977] 1 MLJ 182 and *Abdul Karim v. State of West Bengal* [1969] AIR 1028. Although these cases refer to the right of representations as guaranteed under the Constitution, I am of the view that they are not relevant in this particular issue. For the above reasons, I find no merit in the Applicant's contention.

On the fourth ground, Counsel submitted that the said Order was invalid when it was served on the applicant on 18 July 1985. Alternatively, he submitted that the applicant's continued detention at the office of Cawangan Anti Dadah Georgetown from 15 July until 18 July 1985 was unlawful and illegal by reasons of the same grounds. He contended that the said Order became operative not on the date when the Order was made and signed by the Deputy Minister on 15 July 1985 but on the date of service of the said order on the applicant on 18 July 1985. Counsel relied on an Indian case of *N.N. Majumdar v. N.M. Bardhan* [1959] AIR Calcutta 219 where the learned Judge at p. 221 stated as follows:

In my opinion the position may be summed up as follows:

(1) An order may be taken to be made on the date it came into existence if the nature of the order is such that it is not necessary to communicate it to anyone. It is easy to see that only very few orders will satisfy this test.

(2) If an order is made which affects the rights of a person, then the order must be communicated to such person in order to be complete and effective. The date of the order is the date when it is made known to the affected party.

There are exceptions to the above principle. I need not go into them or into the facts of the case. Suffice it to say that the facts are entirely different from the present case. However on the facts of the present case, it is not disputed that on 11 July 1985 the Advisory Board informed the applicant that the Board proposed to make a report to the Minister recommending that this detention be further extended for another one year. The applicant must have been aware at the time that his Detention Order under s. 4(1) of the Ordinance was to expire on 15 July. I am satisfied that the gist or content of the Order was communicated to him on 11 July 1985 by the Advisory Board. I agree with Cik Zaleha that the irregularity here relates to the service of the Order which does not render the Order invalid. This could be attributed to some miscommunication. However, the said Order was served within a reasonable time. In the circumstances I find that the said Order valid and applicant's detention at Cawangan Anti Dadah, Georgetown lawful.

Lastly, it was the contention of the applicant that the said Order is invalid because it was signed by the Deputy Minister of Home Affairs who was not authorised by the Minister to do so. Again, I find no merit in this contention. In the Act, "Minister" means the Minister charged with responsibility for internal security. The Act does not say that Minister includes the Deputy Minister. However, in my opinion, it is sufficiently clear that under the amended Article 43A of the Constitution, the Deputy Minister has the power of the Minister. Article 43A(2) says that the Deputy Ministers shall assist Ministers in the discharge of their duties and functions and for such purposes shall have all the powers of the Ministers.

Let me conclude by quoting a passage in *The Reverend Thomas Pelham Dale's Case* [1881] 6 QBD 376 where Brett LJ observed at p. 461 as follows:

> Then comes the question upon the *habeas corpus*. It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue.

In our Courts, the then Federal Court in *Musa bin Salleh v. PP* [1973] 1 MLJ 167 in holding a detention order valid made it clear that when in doubt about the validity of a detention or restriction order it should always be resolved in favour of the Accused. In *re: Tan Boon Liat @ Allen and Anor. et. el.* (*supra*), Lee Hun Hoe CJ Borneo stated at p. 113:

> Further preventive detention is a very serious invasion of personal liberty. Certain safeguards are provided by law for the protection of the subject and must be followed scrupulously. Where statutory requirements have to be complied with tthere must be strict compliance since it affects matter of such fundamental importance as the liberty of the subject. In *Ex parte Johannes Choeldi & Ors.* [1960] MLJ 186 Rigby J said to the effect that where personal liberty is concerned an applicant is applying for a writ of *habeas corpus* is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty. Where the detention is not in accordance with law such detention is bad and the person is entitled to be released forthwith.

In the present case, for reasons which I have stated under the first and second grounds I must allow this application as the continued detention of the applicant would be unlawful. Accordingly, I make an order that the applicant shall be set at liberty.

Also found at [1986] 1 CLJ 55